IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 282 OF 2004

Krishnaji Devaji Gujar
(since deceased through L.R.s)
A-1 Smt. Sonubai Namdeo Gujar & ors. ... Appellants

V/s

Shri Pralhad Mahadeo Gujar & ors. ... Respondents

Mr. Ajit Karwande for the appellants.

Mr. P.N. Karlekar for Respondent No.3.

CORAM: P.V. KAKADE, J.

DATED: 7TH JUNE, 2005

P.C.:

1. This is an appeal preferred by the appellants against the judgment and order passed by the Ad-hoc Addl. District Judge, Pune, dated 28.11.2003 wherein the appeal is allowed and the order of the Civil Judge, Jr. Divn., Pune, dated 31.3.1988 decreeing the suit is set aside.

2. I have heard the learned counsel for the appellants as well as the respondents.

3. The appellant-plaintiff filed the suit for removing the encroachment and for perpetual injunction. The agricultural lands bearing Survey No. 38/2 admeasuring 6 acres and 435 gunthas and Survey No. 37/1 admeasuring 5 acres and 27 gunthas, now converted into Gat No.936, situated at Lonki-Kalbhor, Tal. Haveli, Dist. Pune, are owned and possessed by the plaintiffs. The aforesaid two fields are ancestral one. The original Survey Nos. 37 and 38 were two separate compact fields. However, there was a partition in respect of lands Survey Nos. 37 and 38 during life time of the fore-fathers of the parties and after the partition, the aforesaid two survey numbers were divided into and numbered as 37/1 & 37/2 and 38/1 & 38/2.

Accordingly, the land bearing survey No. 38/2 owned and possessed by the defendants and is located towards North side of the plaintiffs land Survey No.38/2. Similarly, the defendants also owned and possessed Survey No. 37/2 which is located towards the South side of the plaintiffs' land Survey No. 38/1. It was alleged by the plaintiffs that the defendants during the last seven years step by step has broken the bandh which is located towards the North side of land Survey No.38/2 and thereby committed encroachment upon the land of the

plaintiff bearing Survey No. 38/2 to the extent of 53 gunthas. In the same manner, the defendants also committed an encroachment to the extent of 4 acres out of Survey No.37/1. When the plaintiffs came to know about the encroachment committed by the defendants, in order to locate the exact area of the encroachment, he got his lands measured through the cadestral surveyor in the month of March, 1979. The cadestral surveyor measured the lands and fixed the boundaries of both the fields on the basis of records. Notice was also issued to the defendants, however, inspite of the notice, the defendants did not remove the encroachment and hence the suit came to be filed. Defendants resisted the suit contending that they did not commit any encroachment on the lands. On the basis of these pleadings, the Trial Court Judge adjudicated the dispute and came to the conclusion that the suit deserves to be decreed and accordingly was decreed in favour of the plaintiffs.

4. The defendants preferred the appeal being Appeal No. 918 of 1988 which was heard but was remanded to the lower Court with certain directions. Thereafter the adjudication was completed and appeal was preferred against the said order in the District Court, Pune. The learned District Judge adjudicated the dispute after

hearing both parties and came to the conclusion that the appeal deserves to be allowed and consequently the judgment and order passed by the lower court in Civil Suit No. 2283 of 1979 dated 26.3.2003 was quashed and set aside. Hence the present appeal.

5. At the outset, it may be noted that the entire controversy involved in this dispute revolves around the various measurements taken of the impugned lands in order to determine the extent of encroachment, if any, as alleged by the plaintiffs. Exh.39 was the document which was of survey made prior to filing of the suit in 1979 in order to determine the existence of encroachment allegedly made by the defendants on the land of the plaintiffs. Subsequently, when the suit came to be filed, the lower Court as well as the lower appellate Court directed that the fresh measurements as well as superior measurements should be made and accordingly such measurements were carried out, the latest being the Court Commissioner’s report Exh.151 alongwith map Exh.163, which showed that there was no encroachment at all. The learned lower appellate Court Judge has relied upon the latest report of the surveyor i.e. Exh.151 read with map Exh.163 and had discarded the earliest measurement map Exh.39 holding that it had no evidential

value especially when it was superceded by superior measurements as directed by the lower Appellate Court.

6. In view of this factual matrix, I am inclined to hold that there is no substantial question of law involved in this case as it is a pure question of appreciation of evidence i.e. comparison and appreciation of the evidence of Court Commissioner's report and map, which in my opinion, has correctly done by the lower appellate Court while it has discarded the document Exh.39 map drawn which was relied upon by the Trial Court while decreeing the suit. My attention was brought to some observations made by the Trial Court in order to show that the witness who was examined in support of the report Exh.151 read with map Exh.163, was not present for the task of taking measurement, however, it is quite clear that the work of measurement was delegated by him to his subordinates and his evidence also reveals that the measurements were taken after referring to the proper report and record. In view of this position, I am not inclined to interfere in the matter only on the ground that there is wrong appreciation of evidence by the lower appellate Court.

7. The learned counsel for the appellant also sought

indulgence of this Court on the basis of provision of Order 41 Rule 23-A of C.P.C. However, taking into consideration the relevant circumstances, I am not inclined to accept this proposition and hold that the said provision is irrelevant so far as the present dispute is concerned. Be that as it may. The fact remains that no substantial question of law is involved in this appeal and, therefore, the appeal deserves to be dismissed and stands dismissed.

(P.V. Kakade, J.)